IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 5561

LEONA H. BETHEA,
Individually and as Independent Executrix of the
Estate of Catherine Henke,
Petitioner,

vs.

FRANK SCOFIELD,
Individually and as United States Collector of
Internal Revenue,
Respondent.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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BLUE AND BLUE, PRINTERS

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE AND
ASSOCIATE JUSTICES OF THE
SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above-entitled cause on November 19, 1948, reversing the judgment of the District Court of the United States for the Western District of Texas entered on September 3, 1947, and remanding the cause.

OPINIONS BELOW

The opinion of the District Court of the United States for the Western District of Texas is reported in 74 F. Supp. 31. The opinion of the Circuit Court of Appeals (R. 79-90) is reported in.....F. (2d).....

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 19, 1948. (R. 91). The jurisdiction of this Court is invoked under Section 1254 (1), Title 28, United States Code, Judiciary and Judicial Procedure and under Supreme Court Rule No. 38, Sec. 5.

QUESTIONS PRESENTED

The controlling questions presented in this petition are:

1. Whether a joint and mutual will and covenant executed by husband and wife, citizens and residents of Texas, was properly construed as an attempt by each to dispose of only his or her one-half interest in the community property.

2. Whether a surviving wife who allowed a joint and mutual will and covenant to be probated as the separate will of her deceased husband is bound by the terms thereof, where the joint and mutual will and covenant provided for a fixed and guaranteed minimum annual income to the wife for the rest of her life with remainder over, and the wife accepted the benefits provided in the joint and mutual will and covenant.

3. Whether a joint and mutual will and covenant executed by husband and wife was properly construed as a declaration of trust as to the surviving wife, and as a will as to the deceased husband.

4. Whether the Circuit Court of Appeals may prop-

erly refuse to follow and apply an applicable decision of the Supreme Court of the United States.

5. Whether the legal effect of a contingent right to invade corpus was construed correctly by the Second Circuit in *Bankers Trust Co.* v. *Higgins*, 136 F. (2d) 477, or by the Fifth Circuit in the instant case.

6. Whether an inter vivos transfer in trust made orally by a wife after the death of her husband, pursuant to contract between them, shows on its face that it was made in contemplation of death.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, infra, pp.....

STATEMENT OF FACTS

The facts, as stipulated and proved upon trial in the District Court, (R. 19-62) may be summarized as follows:

On January 27, 1928, Catherine Henke and her husband, Henry Henke, then residents of Houston, Harris County, Texas, executed a joint will in which Henry Henke appointed the Houston Land & Trust Company as his executor and trustee, and Catherine Henke appointed her husband as her executor and trustee. Said joint will provided that in the event Henry Henke died first, the joint property should be taken charge of by the Houston Land & Trust Company and kept intact until eight years after Mrs. Henke's death, when it should be distributed to designated beneficiaries (R. 33-34).

Said will provided that in the event Henry Henke died first, the executor and trustee should pay to Mrs. Henke $40,000 per year out of the net revenue of the joint property, and that if the net revenue was insufficient

for that purpose, then the principal of the joint property would be resorted to in order to pay such yearly sum. (R. 35).

Henry Henke died first on February 18, 1928. On May 15, 1928, the said joint will was probated as the will of Henry Henke, and the entire community estate of Henry and Catherine Henke passed to, vested in, was actually delivered to, and was taken possession of by the Houston Land & Trust Company. Catherine Henke thereafter received the annual allowances provided for in said joint will. (R. 21).

During the period of administration, the executor administered the entire community estate of Henry and Catherine Henke as one fund, but at the close of administration the Houston Land & Trust Company, as trustee, opened two trust accounts and placed one-half of the residue of the former community property in each account. One of these was carried in the name of "Estate of Henry Henke, Deceased", and the other in the name of "Mrs. Catherine Henke Trust". (R. 21-22).

The community estate at the death of Henry Henke consisted of stock in Henke & Pillot, Inc., a corporation engaged in the grocery business; business property in Houston; real estate notes and cash. (*Bethea* v. *Sheppard*, 143 S.W. (2d) 997, 999).

Catherine Henke, under date of June 10, 1932, made a will which disposed of her estate acquired after the death of Henry Henke but made no attempt to dispose of any of the former community property in the hands of the Houston Land & Trust Company as trustee. (R. 20, 25). She died on November 19, 1936, (R. 20), and thereafter her executrix filed an estate tax return which did not include any of her former community property.

(R. 22). An agent of the Commissioner proposed to include one-half of the property in the hands of the Houston Land & Trust Company in the gross estate of Catherine Henke and recommended additional estate taxes in the sum of $398,836.35. (R. 22). After a conference with petitioner's accountant, the agent reduced the additional assessment of taxes and interest thereon to $91,-431.84 and $12,358.32, respectively, which was paid by petitioner. (R. 24). Of the deficiency so assessed, $77,-168.10 and interest $10,430.35 were attributable to the inclusion of the former community property in the hands of the trustee. (R. 24).

At all times prior to Mrs. Henke's death the annual income produced by the property in the hands of the trustee was in excess of $40,000.00 per year, (R. 24), and the property was producing income at an annual rate in excess of $40,000.00 per year immediately prior to Mrs. Henke's death. (R. 53).

At the time of her death, Mrs. Henke was 81 years of age and had a life expectancy the moment before death of 4.48 years. (R. 51).

On May 20, 1943, the petitioner filed a claim for refund of the additional tax and interest. (R. 24). Said claim for refund was rejected by the Commissioner of Internal Revenue on two grounds, (R. 13):

1. That petitioner was estopped to file a claim for refund by reason of having executed Waiver Form 890.

2. That the transfer made by the decedent by the joint will and trust agreement executed January 27, 1928, was one intended to take efffect in possession and enjoyment at or after death under the provisions of Section 302(c) of the Revenue Act of 1926.

Petitioner filed suit on the rejected claim in the District Court of the United States for the Western District of Texas. The District Court held that Mrs. Catherine Henke, by having the will of her husband probated and accepting the benefits under the will, waived her original community interest in the property and became bound by the terms of the will and covenant, and further, that she was not estopped to file a claim for refund. (R. 70, 71).

The Circuit Court of Appeals reversed, holding that Mrs. Henke made a transfer to take effect in possession or enjoyment at or after death and also made a transfer in contemplation of death.

REASONS WHY WRIT SHOULD BE GRANTED

1. The case is of such importance to the Federal Government because of its effect on taxation of property in Texas transferred by joint wills as to call for the exercise of this Court's discretion in granting a writ.

2. The Circuit Court of Appeals held that the surviving wife was not bound by the terms of the joint and mutual will and covenant, which was probated as the separate will of the deceased husband, where such will gave the wife a guaranteed minimum income for life, payable out of the income from the entire community estate, with remainder over to their daughter and her children.

This decision is in direct conflict with the local law of Texas as declared by the Supreme Court in *Chadwick* v. *Bristow*, 208 S.W. (2d) 888, and with the Circuit Court's own decision in *Commissioner* v. *Masterson*, 127 F. (2d) 252, in which cases it was held that where a surviving wife probated a joint will as the will of the deceased husband and accepted the benefits provided therein,

she thereby waived her original community interest in the property and became bound by the terms of the joint will.

3. The Circuit Court of Appeals held that Catherine Henke made an inter vivos transfer in trust intended to take effect in possession or enjoyment at or after death. Assuming that Catherine Henke made an inter vivos transfer in trust, the basis of this ruling is not clear. If it is based on the fact that Mrs. Henke was entitled to an annuity out of income, then the decision is in direct conflict with this Honorable Court's decision in *Hassett* v. *Welch*, 303 U.S. 303, where it was held that the retention of the right to receive the income from a trust by the settlor did not make the trust corpus taxable to the estate of the settlor, where the trust was created prior to March 3, 1931.

If the decision is based on the fact that Mrs. Henke had a contingent right to invade corpus, then it conflicts with the decision of the Second Circuit in *Bankers Trust Co.* v. *Higgins*, 136 F.(2d) 477, where it was held that the sum of the possible future invasions was the measure of any interest which the death of the settlor "affected," and of what should have been included in the estate.

4. The Circuit Court of Appeals held that Catherine Henke made an inter vivos transfer in trust in contemplation of death. Again assuming that she made an inter vivos transfer in trust, since there was no evidence in the record that she was contemplating her own death when the trust was created (when she elected to take under the will), there was no statutory presumption that she acted in contemplation of death, and the Commissioner of Internal Revenue did not hold that she made a transfer in contemplation of death, the Circuit Court of Appeals was without power to set aside the trial court's finding that she did not act in contemplation of death. *Behlehem Baking Co.* v.

United States, 129 F. (2d) 490, and rule 52a, Federal Rules of Civil Procedure.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue out of and under the seal of this Honorable Court directed to the Fifth Circuit Court of Appeals commanding that court to certify and send to this Court for its review and determination a full and complete transcript of the record and of the proceedings of the said United States Circuit Court of Appeals, Fifth Circuit, had in the case numbered and entitled on its docket No. 12,215 styled *Frank Scofield, Individually and as United States Collector of Internal Revenue, Appellant*, versus *Leona H. Bethea, Individually and as Independent Executrix of the Estate of Catherine Henke, Appellee*, to the end that this case may be reviewed and determined by this Court as provided for by the Statutes of the United States; and that judgment of the United States Circuit Court of Appeals for the Fifth Circuit be reversed with appropriate directions by this Court, and for such further relief as to this Court may seem proper.

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APPENDIX

Revenue Act of 1926:

Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Where within two years prior to his death but after the enactment of this Act and without such a consideration the decedent has made a transfer or transfers, by trust or otherwise, of any of his property, or an interest therein, not admitted or shown to have been made in contemplation of or intended to take effect in possession or enjoyment at or after his death, and the value or aggregate value, at the time of such death, of the property or interest so transferred to any one person is in excess of $5,000, then, to the extent of such excess, such transfer or transfers shall be deemed and held to have been made in contemplation of death within the meaning of this title. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death but prior to the enactment of this Act, without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this title.

Vernon's Civil Statutes of Texas:

Art. 8295. Where a testator shall devise or be-

queath an estate or interest of any kind by will to a child or other descendant of such testator, should such devisee or legatee, during the lifetime of the testator, die leaving children or descendants who shall survive such testator, such devise or legacy shall not lapse by reason of such death; but the estate so devised or bequeathed shall vest in the children or descendants of such legatee or devisee in the same manner as if he had survived the testator and died intestate.

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The opinion of the District Court of the United States is reported in 74 F. Supp. 31. The opinion of the Circuit Court of Appeals is reported in.....F. (2d).....

JURISDICTION

This has been stated under subdivision II in the preceding Petition for Writ of Certiorari, to which reference is here made, and, therefore, will not be repeated here.

QUESTIONS PRESENTED

The questions presented have already been stated in

the preceding Petition for Writ of Certiorari, on pages 2 to 3, inclusive, which are hereby adopted and made a part of this brief.

STATUTES INVOLVED

The statutes involved have already been stated in the Appendix to the Petition for Writ of Certiorari, pages 9 to 10, inclusive, to which reference is here made, and, therefore, will not be repeated here.

STATEMENT OF THE CASE

This has already been stated in the preceding Petition for Writ of Certiorari, on pages 3 to 6, inclusive, which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS

1. The Circuit Court of Appeals erred in holding that neither Henry Henke nor Catherine Henke attempted to devise or bequeath more than his or her one-half of their community property by their joint and mutual will and covenant.

2. The Circuit Court of Appeals erred in holding that Mrs. Henke was not bound by the terms of their joint and mutual will and covenant because she did nothing contrary to the provisions thereof.

3. The Circuit Court of Appeals erred in holding that the equitable doctrine of estoppel was not applicable to this case.

4. The Circuit Court of Appeals erred in holding that Mrs. Henke did not waive, release, or lose title to, her interest in the community property by filing for probate the joint will as the separate will of Henry Henke,

and by thereafter accepting the benefits given to her by their joint and mutual will and contract.

5. The Circuit Court of Appeals erred in holding that because, under the law of Texas, a joint will of husband and wife may be probated on the death of one testator as his will and again probated on the death of the other testator as the will of the latter, that title to the entire community property of Henry and Catherine Henke did not pass under the provisions of Henry Henke's separate will.

6. The Circuit Court of Appeals erred in holding that Catherine Henke made an inter vivos transfer in trust.

7. The Circuit Court of Appeals erred in holding that the Houston Land & Trust Company was to act as executor for the decedent, and as trustee for the survivor during her life.

8. The Circuit Court of Appeals erred in vacating and setting aside the finding of the trial court that Mrs. Henke did not make a transfer of properties intended to take effect in possession or enjoyment at or after her death, within the meaning of Section 302(c) of Revenue Act of 1926, prior to amendment: the record herein contains substantial evidence supporting that finding of the trial court.

9. The Circuit Court of Appeals erred in vacating and setting aside the finding of the trial court that Mrs. Henke did not make a transfer of her properties in contemplation of her death within the meaning of Section 302(c) of Revenue Act of 1926, prior to amendment: the record contains substantial evidence to support that finding of the trial court.

10. The Circuit Court of Appeals erred in reversing the decision of the District Court.

ARGUMENT

I.

Each spouse disposed of the entire community property by their joint and mutual will and covenant in the event he or she should die first. (Pertinent to assignment 1 and first question.)

The Circuit Court of Appeals held that neither party attempted to dispose of more than his or her one-half interest in the community property. This holding is in direct conflict with the provisions of the will, with the stipulation of facts and with the holding of Judge Rice of the District Court, long an able judge of the Texas Tenth Court of Civil Appeals.

The joint will is set out in full in the record (R. 28-43). Catherine Henke appointed Henry Henke as executor and trustee of *her property* (R. 33). (Emphasis supplied). This language indicates that she was attempting to dispose of her property only, but the inference is refuted by the provisions of the will as a whole. The inference is refuted by the following provisions of the will: "Upon the death of Mrs. Catherine Henke, if the said Henry Henke is living, he shall keep *our joint property* intact and not distribute same during his lifetime, * * *" (R. 34). (Emphasis supplied).

Henry Henke appointed the Houston Land & Trust Company as executor and trustee of *his property*. (R. 34). (Emphasis supplied). This language indicates that Henry Henke was attempting to dispose of his property only, but the inference is refuted by the following provisions of the will: "In the event of Henry Henke's death, if Mrs. Catherine Henke is living, then the *joint property* shall thereupon be taken charge of by the Houston Land

& Trust Company and kept intact until time for distribution arrives under the provisions hereof * * *" (R. 35). (Emphasis supplied). And: "If Henry Henke dies before the death of Mrs. Catherine Henke, the Executor and Trustee shall pay to Mrs. Catherine Henke, during her lifetime * * *, the sum of Forty Thousand Dollars ($40,000.00) per year out of the net revenue of our *joint property*, and if said net revenue is insufficient for such purpose, then the principal of *our joint property* shall be resorted to in order to pay such yearly sum * * *" (R. 35). (Emphasis supplied).

The appointing of an executor and trustee of "her property" and "his property" is further explained by the fact that the drafter of the joint will realized that the joint will, when offered for probate as the separate will of either spouse, would put the survivor to an election and, if the survivor renounced the will and took under the law, only the deceased spouse's property would be subject to final disposition under the joint will.

The right of the wife to disclaim under the will and take according to law, accounts for the provision that, "If Henry Henke should die before Mrs. Catherine Henke does and for any reason, legal or otherwise, the foregoing bequests should not be paid out of our joint property, nevertheless, said bequest shall be paid in any event and shall be deducted from Henry Henke's portion of our joint property but shall be paid only the one time and it shall not be construed that such bequests are again payable out of the portion of Mrs. Catherine Henke's property after she shall have died."

While there might be some doubt about Mrs. Henke's intentions, there is none regarding the portion of the joint will that comprised Henry Henke's separate will. He left Mrs. Henke an annuity guaranteed by the entire com-

munity property. The $40,000 per year was to be paid out of the net revenue of the joint property. There was no provision that $20,000 would be paid out of his property and $20,000 out of her property.

Further, it was stipulated in the trial court that Mrs. Catherine Henke turned over her one-half of the community property to the Houston Land & Trust Company *as executor of the Estate of Henry Henke* (R. 47-48). (Emphasis supplied).

The record contains no evidence that Mrs. Henke had anything whatever to do with the act of the trustee in dividing the corpus into two separate and distinct parts. Obviously, the trustee construed the joint will as creating two funds. However, this is not significant as a person may create as many trusts by will as he wishes, provided he has property sufficient to provide the corpus of each trust.

II.

Mrs. Catherine Henke by having the will of her husband probated and accepting the benefits under the will waived her original community interest in the property disposed of by will and became bound by the terms of the will and covenant. (Pertinent to assignments 2, 3 and 4 and second question).

The Circuit Court of Appeals held that Mrs. Henke was not bound by the terms of the joint and mutual will and covenant because she did nothing contrary to the provisions thereof and because the equitable doctrine of estoppel was not applicable to this case, and that she did not waive, release, or lose title to, her interest in the community property by filing for probate the joint and mutual will as the separate will of Henry Henke. This holding

is in direct conflict with the decisions of the Texas courts and with the Circuit Court's own decision in *Commissioner* v. *Masterson*, 127 F. (2d) 252.

The correct rule is stated in 44 *Tex. Jur.* 669, as follows:

> "If the agreement contemplated nothing further than reciprocal dispositions, the surviving party holds his own estate, and also the property of the decedent, free of any restriction or limitation. *Aniol* v. *Aniol*, 62 S.W. (2d) 668. But if the contract involved a disposition of the property of both parties — e.g., where the writing or writings created an estate in remainder to take effect at the termination of a life estate in the survivor—the latter is held to be bound thereby. *Wallace* v. *Peoples*, 89 S.W. (2d) 1030; *Heller* v. *Heller*, 233 S.W. 870; *Sherman* v. *Goodson's Heirs*, 219 S.W. 841, error refused. Having probated the will of the other party and accepted the benefits thereof, the survivor may not defeat the rights of the remainderman. *Ellsworth* v. *Aldrich*, 295 S.W. 206."

This decision is also in direct conflict with the opinion of the Supreme Court of Texas in *Chadwick* v. *Bristow*, 208 S.W. (2d) 888, decided February 18, 1948, in which it was held that where joint will of husband and wife devised property to survivor for life with remainder to children, upon probate of will by surviving wife and acceptance of provisions thereof, titles became vested and dispositions made became binding upon wife.

Even if it be true that neither Henry nor Catherine Henke attempted to dispose of more than his one-half interest in the community property, the joint will was contractual in nature, and when Catherine Henke allowed the joint will to be probated as the separate will of her de-

ceased husband and accepted the benefits provided therein, she became bound by the terms of the joint will and covenant. Thereafter she was estopped from asserting any title to or interest in the corpus other than the contingent right to invade corpus in case the income was insufficient to pay her annuity.

III.

Title to the entire community property passed under the provisions of Henry Henke's separate will. (Pertinent to assignments 5, 6 and 7 and third question).

The Circuit Court of Appeals held that because, under the law of Texas, a joint will may be probated on the death of one testator as his will and probated again on the death of the other testator as the will of the latter, the corpus of the Catherine Henke Trust did not pass under the separate will of Henry Henke. The Circuit Court, in effect, held that Mrs. Henke made an inter vivos transfer in trust on July 1, 1929, as evidenced by the following statements in the opinion:

> "Under Texas law, while the husband's executor may administer upon community property until community debts are paid, it is well settled that the wife's community interest should be released to her as soon as all community debts are paid. * * * She (Mrs. Henke) permitted the executor of her husband's will to retain possession of her half of the community property and hold it in trust, * * *."

This holding conflicts with the stipulation of facts to the effect that title to the entire community property "passed to, vested in, was actually delivered to, and was taken possession of by the said Houston Land & Trust Company" on May 15, 1928. (R. 21). It also conflicts

with the stipulation of facts to the effect that "during the period of administration, the said executor * * * paid all specific bequests and *annual allowances* provided for in said joint will * * *." (R. 21). (Emphasis supplied). It follows that since Mrs. Henke accepted the $40,000 annual payment during the period of administration, she had made her election prior to July 1, 1929, therefore, on said date she had already lost her right to demand release of her one-half of the community property. In *Larrabee* v. *Porter*, 166 S.W. 395, error refused, the court said:

> "There seems to be no question but that husband and wife can make joint and mutual wills, containing reciprocal obligations; and with reference to their revocation the rule seems to be, as adduced from the authorities, that such will is revokable by the testator at any time prior to his death, and this is so though he survives the other testator, *provided he takes no advantage under the will.*" (Emphasis supplied).

This holding also is in direct conflict with *Chadwick* v. *Bristow*, 204 S.W. (2d) 65, affirmed by the Supreme Court of Texas, 208 S.W. (2d) 888, where the contention was made that only one-half of the community property passed under the provisions of a joint will which was probated as the separate will of the deceased husband. The Court of Civil Appeals, one judge dissenting, held that the entire estate of both spouses vested under the husband's will. Due to the dissent, Chief Justice McClendon wrote a supplemental opinion in which he made the following statements:

> "If there had been no joint will, but only the will of the father attempting to dispose of the entire estate of both spouses, the result as to all property of both those estates would have been the same. The

mother would have been put to an election and her acceptance under the will would have vested the entire property of both estates as of the date of the father's death. No subsequent will of the mother could have altered or defeated such vesting. The subsequent probating of the mother's will could not operate upon any of such property, as the entire title vested under the father's will."

The Circuit Court of Appeals cited *Wyche* v. *Clapp*, 43 Tex. 543, decided by the Supreme Court of Texas in 1875, as authority for the proposition that a joint will cannot take effect as a joint will while one of the parties survives, and states that this decision has never been overruled by the Supreme Court of Texas, but has been cited and followed in later cases. It is true that the *Wyche* case has never been overruled, but it has been distinguished. The *Wyche* case held that a joint will could not take effect as a joint will while one of the parties survived because the survivor could revoke it. The court, however, recognized that a married woman could bind or estop herself after the marriage was dissolved, saying: "But when one of the parties to such an agreement is a married woman, it could have no binding force against her estate * * * unless * * * she had in some way bound or estopped herself from denying it after she became free from coverture."

In *March* v. *Hunter*, 50 Tex. 253, the *Wyche* case was cited as authority for the proposition that a joint will made by husband and wife could be admitted to probate by the wife after the husband's death.

In *Jordan* v. *Abney, Adm.*, 97 Tex. 304, the *Wyche* case was cited as authority for the proposition that a contract between two persons upon valuable consideration, that one will, at his death, leave property to the other,

is enforcible, where no statute is contravened.

In *Anoil* v. *Anoil*, 94 S.W. (2d) 425, the *Wyche* case was cited as authority for the proposition that a joint will could be construed as being the separate will of each of the parties.

In *Winton* v. *Griffith*, 133 Tex. 348, the *Wyche* case was cited as authority for the proposition that where a joint will is admitted to probate as the separate will of both the husband and the wife, it must be considered as such by the appellate court.

In *Gorman* v. *Gause*, 56 S.W. (2d) 855, the *Wyche* case was cited as authority for the proposition that a joint and mutual will of husband and wife cannot be given effect as a joint and mutual will while one party survives, as it was subject to be revoked by the survivor.

It is still the law of Texas that a joint will cannot be probated as a joint will while one party survives, but where the joint will leaves the survivor a life estate in the entire community property with remainder over, the survivor is put to an election. If he takes under the will, as Mrs. Henke did, he cannot revoke the joint will. The Texas law in regard to election is stated in 44 *Tex. Jur.* 865, as follows:

> "A recurrent situation which requires an election on the part of the devisee or legatee is where the will of husband or wife disposes of property which belongs to both spouses, at the same time making provision for the other as compensation for the loss of his or her rights or ownerhip. *Dakan* v. *Dakan*, 83 S.W. (2d) 620, 625. The surviving spouse, being entitled under the will to benefits which are inconsistent with his or her rights as allowed by law, is

required to elect or choose between accepting or renouncing the provisions of the will."

In *Nye* v. *Bradford*, 193 S.W. (2d) 165, the Supreme Court said that a joint will, on the death of one testator, *may* be probated as his will and again probated on the death of the other testator as the will of the latter. (Emphasis supplied). The Court also held that a joint will whereby the survivor was to receive a life estate with power to sell and with remainder in their two children who were to be treated alike, and hence, after husband's death, wife who probated will and took under it was bound by it and could not effectively convey the property to one of the children as a gift, to the exclusion of the other.

The Circuit Court of Appeals recognized that, under the law of Texas, a joint will of husband and wife cannot be probated as such while one party survives, but can be probated as the separate will of the deceased spouse. It recognized that, in the instant case, the joint will was probated as the separate will of Henry Henke but, in construing the will, it considered it as a joint will, and, in so doing, completely ignored the controlling decisions under Texas law. Since the joint will was probated as the separate will of Henry Henke, only those provisions which could have been included in the will of Henry Henke, if no joint will had been made, may be considered.

What disposition did Henry Henke make of the community property? His will provided that in the event he predeceased Mrs. Henke, the entire community estate would be turned over to the Houston Land & Trust Company and be held in trust until eight years after Mrs. Henke's death. He made no separate disposition of his one-half interest in the community property. Had Mrs. Henke refused to take under his will and claimed under the law,

no trust fund would have been established. The Houston Land & Trust Company would have been compelled to distribute his one-half interest in the community property to his heirs at law at the same time that they released Mrs. Henke's interest in the property.

Under the law of Texas the husband has the control and disposition of the community property during marriage. Upon the death of the husband, the entire property is subject to administraion. *Barbour* v. *Commissioner*, 89 F. (2d) 474. Since Henry Henke attempted to dispose of the entire community property by will, and Mrs. Henke accepted the benefits provided in said will during the period of administration, she lost her right to claim under the law prior to the time when she could have acquired the control and disposition of her former interest in the community property.

While the joint will could have been probated again after the death of Mrs. Henke as her separate will, it would have been an idle gesture as title to all the former community property had passed to the Houston Land & Trust Company in 1928 under the provisions of Henry Henke's separate will.

Further, the Circuit Court of Appeals said: "The Land Company was designated to act both as executor and trustee; clearly this indicates that it was to act as executor for the decedent, and as trustee for the survivor during her life." Since part of the community estate consisted of real estate, this holding clearly is contrary to Texas law under which real property can be transferred in trust only by deed or by will. The rule regarding transfer of real estate under Texas law is thus stated in *42 Tex. Jur.* 614:

> "Since the law does not give effect to an imperfect gift, for a gratuitous settlement of real property

in trust to be effective the essential thing is that the property be conveyed to the trustee by deed, or a trust be declared by deed (which, in effect, appoints the declarant himself to be trustee), or that the trust be declared by a testamentary writing."

Since Mrs. Henke's will could not be probated while she was living, she did not create a testamentary trust in 1928, and as she never transferred her interest in the community property to the Houston Land & Trust Company by deed, it follows that she did not create an inter vivos trust in 1928 nor at any other time.

The instrument which Henry and Catherine Henke executed begins as follows:

> "We, Henry Henke and his wife, Mrs. Catherine Henke, residents of the City of Houston, Harris County, Texas, do make, publish, and declare, jointly this our last will and testament, hereby revoking all former wills and codicils." (R.28).

Each testator appointed an executor and trustee to act after his death. Neither appointed a trustee to act as such prior to administration on his estate. Mrs. Henke appointed Henry Henke as her executor and trustee and, in the event Henry Henke was not living, or after qualifying as such, should die before the expiration of the time mentioned in the will, then she appointed the Houston Land & Trust Company, not as trustee, but as executor and trustee in the place of Henry Henke, (R. 33), which substitute appointment could become effective only after her death.

If Henry Henke had executed a separate will in which he left Mrs. Henke a life estate in the entire community property, no one would contend that she was not put to

an election. When the joint will was offered for probate in 1928, it was admitted to probate as the separate will of Henry Henke, therefore, all provisions of the joint will disposing of Mrs. Henke's property, by her, must necessarily be disregarded.

The Circuit Court of Appeals, especially the concurring opinion of Judge Waller, placed great weight upon the decision of the Texas Court of Civil Appeals in *Bethea* v. *Sheppard*, 143 S.W. (2d) 997. An examination of that opinion will disclose that the Court of Civil Appeals did not construe the joint will to be a declaration of trust as to the provisions applicable to Mrs. Henke's share of the community property. That interpretation of the instrument was made either in the lower court or prior to the time suit was filed therein, and was not contested by the appellant in the Court of Civil Appeals. The first sentence of the opinion discloses this: "This appeal involves the construction of the joint will *and trust agreement* of Henry Henke and his wife, * * *" (Emphasis supplied). While the opinion sometimes refers to the writing as a "trust instrument" without including the word "will", at no time is the instrument mentioned as a "will" without also including the words "and trust agreement." In other words, both parties before the Court of Civil Appeals admitted the instrument to be a "joint will and trust agreement", and asked that court to determine what inheritance taxes were due the State of Texas.

The Circuit Court's holding that Mrs. Henke conveyed title to her one-half interest in the community property to the Houston Land & Trust Company in 1929, by her separate will, while she was still living, is so obviously contrary to law and reason as to merit no consideration whatever.

IV.

Even if Catherine Henke made an inter vivos transfer in trust, it was not one intended to take effect in possession or enjoyment at or after death, within the meaning of Section 302(c), Revenue Act of 1926, prior to amendment. (Pertinent to assignment 8 and fourth and fifth questions.)

If Catherine Henke passed title to her one-half interest in the community property of herself and Henry Henke to the Houston Land & Trust Company, she did so in 1928. If the Circuit Court's holding that the transfer was one intended to take effect in possession or enjoyment at or after death was based on the fact that she was to receive $40,000 per year out of the net income of the joint property, then the decision is in direct conflict with this Honorable Court's decision in *Hasset* v. *Welch*, 303 U.S. 303, where it was held that the retention of the right to receive the income from property transferred in trust did not require the inclusion of the trust corpus in the settlor's estate, where the transfer was made prior to March 3, 1931.

If the decision is based on the fact that Mrs. Henke had a contingent right to invade corpus, then the decision conflicts with *Bankers Trust Co.* v. *Higgins*, 136 F. (2d) 477, where it was held that the sum of the possible future invasions was the measure of any interest which the death of the settlor "affected," and of what should have been included in his estate.

If the Circuit Court's decision was based on the decision of the Texas Civil Court of Appeals in *Bethea* v. *Sheppard*, 143 S.W. (2d) 997, as was the concurring opinion of Judge Waller, the decision still conflicts with *Hassett* v. *Welch*, 303 U.S. 303, because the Court of Civil Appeals held that Mrs. Henke had made a transfer

to take effect in possession or enjoyment at or after death because she had the right to receive an annuity. Further, the Court distinguished between federal estate taxes and state inheritance taxes, pointing out that the former is imposed upon right of grantor to transfer property, and the latter is imposed upon right to succeed to possession, or enjoyment of property. In addition, the Court of Civil Appeals held that the designated beneficiaries did not have a vested interest in the remainder. This holding has been overruled by the Supreme Court in *Chadwick* v. *Bristow*, 208 S.W. (2d) 888.

In the brief to the Circuit Court of Appeals, counsel for the Government, referring to the holding that the trust was intended to take effect in possession or enjoyment at or after death, admitted that the holding was irrelevant to this case. (Page 22 of appellant's brief).

The Circuit Court of Appeals said: "We are concerned with what title, if any, she had in this trust fund at the time of her death." The Circuit Court of Appeals held that the trust was established under the terms of the joint will and contract, and was intended to take effect during her life if her husband died first. Since her husband did die first, and all of the community property was turned over to the Houston Land & Trust Company, the trust was created in 1928. It really does not matter whether the trust was created under the terms of Henry Henke's separate will or whether one-half of the trust was created by his separate will and one-half by Mrs. Henke pursuant to contract with her husband. Neither does it matter whether or not she was bound by the contract at the time it was made. The essence of the joint will and covenant was something like this, to-wit: by its terms the entire corpus of Henry Henke's one-half of the community estate guaranteed to Mrs. Henke that, wholly aside from her

one-half of the community property, and irrespective of her duration of life, she would receive not less than $40,000 a year, even though the entirety of her one-half of the corpus might be lost or wasted by the trustee. In return for this guaranty, Mrs. Henke agreed to contribute her one-half interest in the community property, and both parties agreed that the remainder, after the death of the survivor, would be distributed to their daughter or to their grandchildren.

After the joint will was probated as the separate will of Henry Henke and Mrs. Henke accepted the annuity therein provided, she was thereafter estopped from asserting any title to or interest in the corpus of what formerly was her one-half of the community property, except as to the contingent right of invasion in case of insufficient income from the joint property to pay the annuity. Since the net income from the joint property averaged $122,812.04 (*Bethea* v. *Sheppard*, 143 S.W. 997, 999), the possibility of invasion was too remote to have any value. Moreover, since the remaindermen had a vested interest in the corpus of the joint property, *Chadwick* v. *Bristow*, 208 S.W. (2d) 888, Mrs. Henke did not retain any "string" or "tie" to any part of the corpus other than the contingent right of invasion.

There was no possibility of reversion by operation of law since the remaindermen had a vested interest. If Mrs. Bethea, the daughter, had predeceased Mrs. Henke, the corpus would have passed to Mrs. Bethea's decendants. If Mrs. Bethea had no descendants, Mrs. Henke's interest in the corpus would not have changed. Neither could Mrs. Henke have made any disposition of the corpus by will or contract. The trustee would have been required to hold the corpus until eight years after Mrs. Henke's death, at which time the corpus of both funds would be distributable to the heirs of the last descendant of Mrs. Bethea

to die according to the Texas law of descent and distribution. Art. 8295, Revised Civil Statutes of Texas.

V.

Even if Catherine Henke made an inter vivos transfer in trust, the evidence does not show, and the district court did not find as a fact, that she made such transfer in contemplation of death within the meaning of Section 302(c), Revenue Act of 1926, prior to amendment. (Pertinent to assignment 9 and sixth question).

As pointed out in Part III of this brief, the Circuit Court was of the opinion that Mrs. Henke made an inter vivos transfer in trust on July 1, 1929; that is, at the close of the period of administration under the will of Henry Henke.

Ignoring, for the sake of argument, the stipulation of fact that title to the entire community estate vested in the Houston Land & Trust Company in 1928, what evidence is there in the record that Mrs. Henke was acting in contemplation of death when she permitted her husband's trustee to become her trustee also instead of demanding the release of her one-half interest in the community property? Since she lived more than seven years after July 1, 1929, there is no statutory presumption that the transfer was made in contemplation of death. Certainly there is no common-law presumption that the transfer was made in contemplation of death, as "contemplation of death" is purely a creature of the internal revenue laws.

The Commissioner of Internal Revenue did not include contemplation of death as a ground for rejecting petitioner's claim for refund, therefore, he, in effect, held that no facts existed which would support the issue of a transfer in contemplation of death. This fact alone is sufficient to support the finding of the trial court that the transfer was not made in contemplation of death.

It is conceded that, had the Commissioner rejected petitioner's claim for refund on the ground that Mrs. Henke had made a transfer in contemplation of death, the burden of proof would have been on the petitioner to establish that Mrs. Henke did not make a transfer, or, if she did, that the transfer was not made in contemplation of death. But the Commissioner made no such allegation of fact. The Collector of Internal Revenue pleaded contemplation of death solely as a defensive issue, therefore, the burden was on respondent to prove that Mrs. Henke made a transfer in contemplation of death. *Koussevitsky, Ex.*, 5 T.C. 650; 10 *Mertens Law of Federal Income Taxation*, Section 58.62. When petitioner established by proof and stipulations of fact the allegations of her complaint, she did not have the burden of negativing special and affirmative defenses. *Powell* v. *United States*, 123 F. (2d) 472.

It is reasonable to assume that if the respondent or other agents of the United States Government who represented it in matters pertaining to the estates of Henry and Catherine Henke prior to the trial of this cause in the United States District Court had possessed knowledge of any fact or facts indicating that Mrs. Henke acted in contemplaion of her own death when she permitted the Houston Land & Trust Company to retain her property at the close of administration under her husband's will, they would have introduced evidence with respect thereto at the trial of this cause.

The Circuit Court's finding that Mrs. Henke made a transfer in contemplation of death seems to be based wholly upon the alleged effect of *Nye* v. *Bradford*, 193 S.W. (2d) 165, and not upon any facts or circumstances reflected in the record of this cause.

It was stipulated as a fact that Henry Henke was a

sick man when the joint will was executed on January 27, 1928, and that he died shortly thereafter. This indicates that both husband and wife were contemplating the husband's death when the will was executed, but does not evidence any contemplation of the wife's death. Further, if the wife made an inter vivos transfer in trust in 1929, she did so pursuant to contract with her husband and not by means of her will. And since the joint and mutual will and covenant provided Mrs. Henke with an annual income of $40,000 for the rest of her life, she was acting from motives connected with life, rather than with death, when she elected to take the guaranteed income rather than her one-half interest in the community property.

A Circuit Court of Appeals is without power to interfere with trial court's finding in case tried without jury, where there is evidence to support the findings and they are not clearly erroneous. *Bethlehem Baking Co.* v. *United States*, 129 F. (2d) 490, and rule 52a, Federal Rules of Civil Procedure.

The Circuit Court of Appeals also erred in holding that Mrs. Henke made a transfer in contemplation of death within the meaning of Section 302(c), Revenue Act of 1926, as amended. The law in effect at the time the trust was created controls, *Hassett* v. *Welch*, 303 U.S. 303, therefore, the decision should have been based on Section 302(c), prior to amendment.

CONCLUSION

It is respectfully submitted that the writ should be granted.

Respectfully submitted,

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INDEX

CITATIONS

828398—49

In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 556

LEONA H. BETHEA, INDIVIDUALLY AND AS INDEPENDENT EXECUTRIX OF THE ESTATE OF CATHERINE HENKE, PETITIONER

v.

FRANK SCOFIELD, INDIVIDUALLY AND AS UNITED STATES COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court (R. 64–71), is reported in 74 F. Supp. 31. The opinion of the Court of Appeals is reported in 170 F. 2d 934. (R. 78–86.)

JURISDICTION

The judgment of the Court of Appeals was entered on November 19, 1948. (R. 87.) The petition for writ of certiorari was filed February 9, 1949. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the value of the corpus of the trust in question is includible in the decedent, Catherine Henke's, gross estate, as a transfer intended to take effect in possession or enjoyment at or after her death, within the meaning of Section 302 (c) of the Revenue Act of 1926, as amended.

2. Whether the value of the trust corpus is includible in her gross estate as a transfer made in contemplation of her death within the meaning of that section.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Regulations involved are presented in the Appendix, *infra*, p. 14.

STATEMENT

The primary issue here presented is whether the value of a transfer in trust made by the decedent, Catherine Henke, in her life time, pursuant to the provisions of a joint will executed by herself and her husband, is includible in her gross estate at her death for estate tax purposes, either as a transfer intended to take effect in possession or enjoyment at or after her death or as one made in contemplation thereof, within the meaning of Section 302 (c) of the Revenue Act of 1926.[1]

[1] The Court of Appeals found is unnecessary to pass upon the Government's contention that the taxpayer was estopped from maintaining this suit because of its agreement to com-

The case was tried to the court without a jury, primarily upon a stipulation of facts, and upon the testimony of three witnesses. The findings follow the stipulation and are substantially as follows:

Catherine Henke, the decedent in question, died November 19, 1936. (R. 65.)

On June 10, 1932, she made a will and on May 6, 1935, a codicil thereto. (R. 65.)

On December 31, 1936, her daughter, Leona H. Bethea, was named as independent executrix (R. 2, 66) and on September 20, 1937, she filed, with the Collector of Internal Revenue for the First Collection District of Texas, a return for the estate of the decedent, showing a net estate in Schedule P thereof of $223,593.12 and a net estate in Schedule Q thereof of $283,593.12. The tax shown on the return after claiming credit for state inheritance taxes in the sum of $4,354.98 was in the sum of $38,963.64, which was paid on January 12, 1938. (R. 65.)

On January 27, 1928, Catherine Henke and her husband, Henry Henke, then residents of Texas,

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promise the Government's claim for additional estate taxes by the inclusion of only 30 percent of the trust estate in question, upon which agreement the Government relied in assessing the deficiency in tax. If this Court should grant the taxpayer's petition for certiorari, the Government will renew this contention as additional, independent support for the judgment below.

made and executed a joint will. Henry Henke was sick when this will was published and died on February 18, 1928. On February 22, 1928, his widow, Catherine Henke, in pursuance of Clause VII of this will, made and published a codicil thereto. (R. 66.)

On May 15, 1928, the joint will and codicil were probated as the will and codicil of Henry Henke, deceased, in Harris County, Texas, and the Houston Land & Trust Company thereupon qualified as executor under the will. (R. 66.)

The joint will provided that if Henry Henke should die before Catherine Henke, she should be paid during her lifetime the sum of $40,000 a year out of the net revenue of the joint property; that if the net revenue was insufficient for such purpose, then the principal of the joint property should be resorted to; and that if the net revenue of the joint property would so justify, then the annual payments to Catherine Henke should be increased to $50,000. The joint will further provided that, after the death of Henry Henke, Leona Bethea, daughter of Henry and Catherine Henke, should be paid annually the sum of $25,000 out of the net revenue of the joint property; that if the net revenue was insufficient for such purpose, then the principal of the joint property should be resorted to; and that if the net income of the joint property would so justify, then the annual payments to

the daughter should be increased to $35,000. It was further provided in the joint will that at the expiration of eight years after the death of both Henry and Catherine Henke, the balance of the estates should be turned over to the daughter Leona Bethea, and if she be not living at that time, then the property should be retained by the trustee for an additional five years and then turned over to the children of Leona Bethea. (R. 35, 38.)

Under the terms of this will, the entire community estate of Henry and Catherine Henke passed to, vested in, was actually delivered to and was taken possesion of by the Houston Land & Trust Company. The company proceeded to administer the estate as such executor until July 1, 1929, at which time it closed its books as executor and opened its books as trustee under the joint will. During the period of administration, the executor administered the entire community estate of Henry and Catherine Henke and paid and discharged out of it all claims against such community estate and paid all specific bequests and annual allowances provided for in the joint will and codicil in accordance with the terms of those instruments. The bequests provided for in the codicil and in Paragraphs numbered I and II of the joint will, and all other disbursements made during the administration, were paid, one-half out of the prop-

erty of Henry Henke and the other half out of the property of Catherine Henke. At the close of the period of administration under the joint will and codicil, the Houston Land & Trust Company, as trustee, opened two trust accounts. One of these was carried in the name of "Estate of Henry Henke, Deceased," and the other in the name of "Mrs. Catherine Henke, Trust." As trustee, the Houston Land & Trust Company divided the residue of the community estate (thenceforth to be accounted for by it as trustee) between the two trust accounts, placing property valued at $1,381,846.88 in each account; and, since July 1, 1929, the trustee has at all times treated and administered the two accounts as separate trust estates in accordance with the provisions of the joint will. (R. 66–67.)

Catherine Henke had accumulated a separate estate after the death of Henry Henke, and the executrix, in making and filing the estate tax return above referred to, included therein only the value of this accumulated separate estate. On November 19, 1936, the net value of the Catherine Henke Trust in the hands of the Houston Land & Trust Company, trustee, amounted to the sum of $1,289,217.92. In a report dated November 15, 1939, the Internal Revenue Agent, Fred B. Lowery, recommended to his superiors in the Bureau of Internal Revenue that the net value of the Catherine Henke Trust as of November

19, 1936, be included in the estate of Catherine Henke as taxable property. On account of this and other corrections of the return, he recommended an additional assessment in estate tax in the sum of $398,836.35. (R. 67–68.)

The report of the revenue agent was furnished to the executrix by the Internal Revenue Agent in Charge on or about February 13, 1940, and thereafter she, through her accredited representatives and attorneys, protested all increases of value of the assets of the estate recommended by the revenue agent and also the inclusion of the corpus of the Catherine Henke Trust in the gross estate. (R. 23, 68.)

At a conference held at San Antonio, Texas, on April 17, 1940, at which the Commissioner of Internal Revenue was represented by John Trimble and Fred B. Lowery, Internal Revenue Agents, and the executrix was represented by W. N. Aikman, her attorney in fact, it was agreed that the executrix would accept all changes recommended by the revenue agent except that 30 percent only of the value of the Catherine Henke Trust was to be included in the gross estate. In other words, the value of this trust was included in the gross estate only to extent of $386,765.37, instead of $1,289,217.92; and on behalf of the executrix it was then and there agreed that she would furnish the waiver mentioned in the next paragraph. (R. 23, 68.)

Pursuant to the agreement mentioned in the preceding paragraph, the executrix delivered to the representatives of the Bureau of Internal Revenue a waiver of restrictions against immediate assessment and collection of the deficiency agreed upon, wherein she agreed not to file or prosecute a claim for refund and further agreed upon request of the Commissioner to execute at any time a final closing agreement under Section 3760 of the Internal Revenue Code. (R. 68–69.)

Thereafter, based on the recommendations of Revenue Agents Lowery and Trimble, the Commissioner of Internal Revenue included only 30 percent of the value of the Catherine Henke Trust on November 19, 1936, in the gross estate of Catherine Henke, deceased, and assessed a deficiency in estate tax of $91,431.84 and interest of $12,358.32, a total of $103,790.16, which was paid by the executrix to the Collector on June 10, 1940. Of the deficiency so assessed, $77,168.10 and $10,430.35 interest (a total of $87,598.45), was attributable to the inclusion in the gross estate of the 30 percent of the value of the Catherine Henke Trust, i. e., $386,765.37. (R. 69.)

On May 20, 1943, the executrix for the estate of Catherine Henke, deceased, filed a claim for refund of the tax so paid on June 10, 1940. (R. 69.)

The claim for refund was rejected by the Commissioner of Internal Revenue, who gave notice

of such rejection by registered letter dated November 11, 1943. (R. 69.)

At all times subsequent to Catherine Henke's death the corpus of the Catherine Henke Trust exceeded one million dollars in value and at all times the annual net income from the joint property held in trust by the Houston Land & Trust Company has exceeded $40,000 per year. (R. 69.)

Th joint will of Henry and Catherine Henke has never been filed for probate as the last will and testament of Catherine Henke. (R. 69–70.)

The District Court found that the transfer made by Catherine Henke in 1928 was not made in contemplation of death and that it was not intended to take effect in possession or enjoyment at or after death. The District Court further said that it did not find any evidence that the Commissioner of Internal Revenue had held or found as a fact that the transfer was made in contemplation of death. (R. 70.)

Finally the District Court found that the waiver executed by Leona Henke Bethea under date of April 18, 1940, was not executed by the Secretary of the Treasury, and that there was no evidence that it was accepted or authorized by him, and that its execution did not mislead the Collector of Internal Revenue or any officers of the Government as to any fact or facts material in this case. (R. 70.)

On the basis of the facts found the District Court concluded that the transfer was not made

in contemplation of death or intended to take effect in possession or enjoyment at or after the testator's death, within the meaning of the applicable statute, namely, Section 302 (c) of the Revenue Act of 1926, as amended; and that the sums paid as bequests under the joint will of January 27, 1928, to the extent paid from the property of the estate of Catherine Henke, were not includible in her estate as gifts made in contemplation of death. (R. 70–71.)

And finally, the District Court concluded that the case of *Commissioner* v. *Masterson,* 127 F. 2d 252 (C. A. 5th), was applicable to the facts in this case, and that, under the facts in the case at bar and the rule laid down by that decision, as a matter of law, Mrs. Catherine Henke, by having the will of her husband probated and accepting the benefits under the will, waived her original community interest in the property disposed of by the will and became bound by the terms of the will and covenant. (R. 71.)

Accordingly, the District Court directed the entry of judgment carrying into effect its findings of fact and conclusions of law. (R. 71.)

The Court of Appeals reversed the District Court's decision on the ground that the transfer in trust was one intended to take effect in possession or enjoyment at the decedent's death within the meaning of Section 302 (c) of the Revenue Act of 1926, and also because it was made by the decedent in contemplation of her death. (R. 84.)

ARGUMENT

The decision of the Court of Appeals was based upon what it considered to be the clear intention of decedent and her husband, evidenced by their joint will, to make a testamentary disposition of his or her respective interest in their community property (R. 81) and upon the court's interpretation of Texas law (R. 82–84).

The petitioner urges (Pet. 18–29) that the court below has misconstrued state law. That the court's construction of state law was not clearly wrong would seem plain from *Bethea* v. *Sheppard,* 143 S. W. 2d 997, where the Court of Civil Appeals of Texas interpreted the joint will here involved and held that inheritance taxes were due to the State of Texas. Under the circumstances, it is submitted that review by this Court of the holding below on the question of state law is not warranted. Cf. *Estate of Spiegel* v. *Commissioner,* 335 U. S. 701.

The petitioner urges (Pet. 30) that if the holding below that the transfer was one intended to take effect in possession or enjoyment at or after death within the meaning of Section 302 (c) of the Revenue Act of 1926 was based on the fact that she was to receive $40,000 a year out of the net income of the joint property, then the decision is in direct conflict with *Hassett* v. *Welch,* 303 U. S. 303. This contention is answered by *Commissioner* v. *Estate of Church,* 335 U. S. 632.

The petitioner finally urges (Pet. 33–35) that the Commissioner did not include contemplation of death as a ground for rejecting petitioner's claim for refund; that therefore he, in effect, held that no facts existed which would support the issue of a transfer in contemplation of death; and that this fact alone is sufficient to support the finding of the trial court that the transfer was not made in contemplation of death. While it may be true that the notice of rejection (R. 12–13) of petitioner's claim for refund (R. 46–48) did not specifically mention contemplation of death, it may be noted that neither did the claim for refund itself, although apparently that was one of the grounds discussed (R. 57) in the negotiations which led to the settlement which the petitioner seeks in this case to repudiate. The sole ground contained in the claim for refund was that, under the law of Texas, when the present decedent turned over her one-half of the community property to the executor of the estate of Henry Henke and accepted the benefits provided in the joint will, she thereby "waived" her original community interest in the property. The petitioner is thus in no position to complain of the fact that the Commissioner's notice of rejection of petitioner's claim for refund did not mention contemplation of death. The rejection notice was responsive to the claim for refund and moreover expressly referred to the settlement negotiations and stated

that the petitioner's "proposal was accepted by the Commissioner and the deficiency in tax, together with interest due thereon, was assessed against the estate pursuant to the waiver".

There is no merit to the petitioner's suggestion (Pet. 35) that since the joint will and covenant provided Mrs. Henke with an annual income of $40,000 for the rest of her life, she was acting from motives connected with life, rather than with death, when she elected to take the guaranteed income rather than her one-half interest in the community property. This annuity was no more than was produced by her one-half of the property. (See Pet. 32.) The holding of the Court of Appeals (R. 81) that each of the parties to the joint will intended to make a testamentary disposition of his or her respective interest in the community property is, we submit, in accord with the record.

The petition for certiorari should be denied.

Respectfully submitted.

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MARCH, 1949.

APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9:

> SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—
>
> * * * * *
>
> (c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, * * *.

Treasury Regulations 80 (1937 ed.):

> ART. 16 [as amended] by T. D. 4966, 1940–1 Cum. Bull. 220]. Transfers in contemplation of death.—* * *
>
> The phrase "contemplation of death," as used in the statute, does not mean, on the one hand, that general expectation of death such as all persons entertain, nor, on the other, is its meaning restricted to an apprehension that death is imminent or near. A transfer in contemplation of death is a disposition of property prompted by the thought of death (though it need not be solely so prompted). A transfer is prompted by the thought of death if it is made with the purpose of avoiding the tax, or as a substitute for a testamentary disposition of the property, or for any other motive associated with death. The bodily and mental condition of the decedent and all other attendant facts and circumstances are to be scrutinized to determine whether or not such thought prompted the disposition.

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